that it is a failure to appreciate those meanings which has led to much confusion in this area of the law. The first meaning is the 'risk of non-persuasion'—that is, should the trier of fact be in doubt as to whether a particular fact be proved, the party on whom the risk of non-persuasion lies has failed to establish the existence or otherwise of that fact. The second meaning is the duty of adducing sufficient evidence for the judge to allow the matter to go to the jury. Sholl J. suggests that the correct analysis where a defence of honest and reasonable mistake is involved is that the duty of adducing evidence lies on the accused but, once this duty is satisfied, the risk of non-persuasion remains on the prosecution, as it does throughout all criminal cases, except where a defence of insanity is involved, or a statutory exception is created. In this way the 'golden thread' of English law is preserved and the cases successfully reconciled.

Thus, it would seem that the minority judgment in *Bonnor's* case is to be preferred to the majority view. Be that as it may, it is clear that the question is a vexed one, so that it is to be regretted that at least two of the judges of the High Court seem prepared not only to accept *Bonnor* as good law, but to extend its application, without engaging in a discussion of the merits of such an extension.

R. SACKVILLE

GARTNER v. KIDMAN[1]

Nuisance—Water and watercourses—Distinction between natural watercourse in which riparian rights can exist and the natural flow of surface water—Rights of proprietors of higher and lower lands in respect of surface waters

Prior to 1909, water in wet seasons collected in a swampy basin situated mainly on the respondent Kidman's land, but also partly on the appellant Gartner's land. When the flood in the swamp became great enough it overflowed at a point in the appellant's land, whence it ran for some three hundred yards along a depression on the appellant's land to a sandpit and there escaped into the ground. This mode of natural drainage still left the swamp covering some sixty acres, and in 1909 a predecessor in title of the respondent had constructed a shallow ditch along the course followed by the superabundant water. In 1938 improvements to the drain almost completely drained the swamp. In 1951 the adjoining parcels of land came into the ownership of Kidman and Gartner, and in that year Gartner's father filled in a section of the drain just inside the boundary fence. However, this barrier was not very effective, and water flowed over the obstruction. In 1958 Gartner and his father, having discovered that the sandpit was of considerable commercial value, erected sandbanks in the drain which retarded the flow of water and caused the swamp on Kidman's land to cover some seventy acres. Kidman claimed that Gartner was obliged in law to remove the sandbanks and to allow the water from

[1] (1962) 36 A.L.J.R. 43. High Court of Australia; Dixon C.J., McTiernan and Windeyer JJ.

the swamp to flow to the runaway hole, and sought an injunction from the court ordering their removal. The trial judge, Chamberlain J., in the Supreme Court of South Australia, declared that Kidman was entitled to the free and unrestricted flow of water, and ordered the removal of the banks.[2] The defendant Gartner appealed to the High Court.

The basis of Kidman's claim was that the sandbanks 'constituted a nuisance'. A private nuisance was described by Windeyer J. as an 'unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it'.[3] That is, it comprehends nuisances to both corporeal and incorporeal hereditaments. In this case, as the sandbanks were on Gartner's own land, Kidman had to show that he had a right appurtenant to Gartner's land which had been interfered with by the erection of the sandbanks.

Firstly, Kidman claimed that as owner of his land he had a prescriptive easement of drainage. However this claim was abandoned at the trial before Chamberlain J., presumably due to the fact of the barrier erected in 1951. Windeyer J. also suggested that due to section 80A of the Real Property Act of South Australia an easement could no longer be created by prescription.[4]

Secondly, Kidman claimed a right over Gartner's land by alleging that he had the rights of a riparian owner in respect of the natural watercourse. Windeyer J. provided a concise statement of the common law in this respect:

> By the common law the proprietor of land upon the banks of a natural stream of running water, is entitled to have, and is obliged to accept, the flow of water past his land. He cannot either deprive those lower down the stream of its flow nor pen it back upon the lands of his neighbour higher up. These rights and obligations do not depend on prescription or grant. They are proprietary in character, natural incidents of the ownership or lawful possession of the land abutting on the stream. . . . They do not depend upon the ownership of the bed of the stream, but of its banks. . . . They are thus called riparian rights.[5]

In contrast, where there is an artificial watercourse, the owner of adjacent land may block or divert it, unless some easement exists in respect of it.

Gartner's claim that he was a riparian owner was put in the alternative. It was alleged firstly that the drain was a natural watercourse that had been improved, and secondly that even if the drain be regarded as an artificial watercourse, the circumstances were such that it should be treated as a natural watercourse. This claim was treated somewhat differently in the three opinions delivered during the case.

[2] *Kidman v. Gartner* [1961] S.A.S.R. 370.
[3] (1962) 36 A.L.J.R. 43, 47. This was the definition given by Winfield: *Winfield on Tort* (6th ed. 1954) 536.
[4] *Ibid.* 51.
[5] *Ibid.* 48. These rules are part of the English common law which Australia has inherited: *Dunn v. Collins* (1867) 1 S.A.L.R. 126. See *Cheshire's Modern Real Property* (9th ed. 1962) 118-119.

Chamberlain J. found that a natural watercourse had existed on Gartner's land, and that Kidman was to be treated as a riparian owner. Also, since Kidman's rights depended on the nature of the watercourse, the artificial improvements of 1909 were to be regarded as part of the natural watercourse. This latter conclusion was based on a passage in the judgment of the Privy Council in *Maung Bya v. Maung Kyi Nyo*.[6] It was on this basis that the injunction was granted.

In the High Court McTiernan J. held that prior to 1909 the course taken by the surplus water could be regarded as a natural watercourse. He held however, that Kidman's argument must be that an existing watercourse had been improved, as it could not be claimed that riparian rights existed in respect of an artificial watercourse unless such rights existed by virtue of a grant or easement. The correct interpretation of *Maung Bya v. Maung Kyi Nyo*[7] was that improvements might be made to an existing natural watercourse, but that such improvements 'are limited to cases where the work done is of a minor nature and has the effect of cleaning out the natural watercourse',[8] and that the period of time over which such improvements have existed is irrelevant. Considering the facts, McTiernan J. found that the 1909 improvements constituted a major operation, and thus riparian rights could not attach to them. Because Kidman's rights were relegated to those existing in respect of the watercourse prior to 1909, the appeal of Gartner was allowed.

Windeyer J., with whom Dixon C.J. concurred, was much more critical of the findings of the trial judge. It was recognized that the finding that the drain was a natural watercourse was one of fact, but doubted that the correct legal tests to decide this question were applied. The word watercourse, when used for the legal purpose of determining whether riparian rights exist, has a narrow meaning; a meaning which must be distinguished from that given to the same word when the rights and obligations relating to occasional flooding are the subject of legal discussion. As distinguished from water of a casual and temporary character, 'a watercourse is a flow of water usually flowing in a certain direction, and by a regular channel, having a bed, banks and sides, and possessing that unity of character by which the flow on one man's land can be identified with that on the land of his neighbours'.[9] The water flow need not be continuous, but is to be distinguished from an occasional outburst. Applying these tests to the facts, it was doubted whether the finding that there was a natural watercourse was correct. Windeyer J. continued however, that even if it was assumed that the drain was a natural watercourse prior to 1909, there was the difficulty that Kidman could hardly claim to have riparian rights in respect of a watercourse which existed

[6] (1925) L.R. 52 Ind. App. 385. 'There is however, a well established principle of law . . . that a watercourse originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land situate on its banks will have all the rights over it that a riparian owner would have if it had been a natural stream: *Sutcliffe v. Booth* (1863) 32 L.J. Q.B. 136; *Holker v. Porritt* (1873) L.R. 8 Ex. 107; *Baily & Co. v. Clark, Son & Morland* [1902] 1 Ch. 649, 664, 669, 673.' [7] (1925) L.R. 52 Ind. App. 385. [8] (1962) 36 A.L.J.R. 43, 46.
[9] *Ibid.* 49, citing a passage from *Kerr on Injunctions* (1867), based on *Briscoe v. Drought* (1860) 11 Ir. C.L.R. 250.

entirely on Gartner's land. It could not be argued that the swamp on Kidman's land formed part of the watercourse for

> when the source of supply of a watercourse is surface water collected in a pool or the overflow of a lake, the watercourse begins at the point where a channel begins and the current commences to flow in reasonably well defined banks.[10]

Windeyer J. continued that the only way Gartner could be considered a riparian owner was if the ditch constructed in 1909 (and it would have to be assumed that this extended into Gartner's land) had acquired the character of a natural watercourse. After an examination of the cases cited by the Privy Council in *Maung Bya v. Maung Kyi Nyo*,[11] and of the facts of that case itself, Windeyer J. concluded that the principle was that

> a right to the flow of water in an artificial watercourse must be acquired by some method recognized by the law for the acquisition of proprietary rights.[12]

Riparian rights in respect of the artificial watercourse made in 1909 could not exist, as there was no basis on which a proprietary right could be said to have been created.

Thirdly, Kidman claimed that a proprietor of lower land (Gartner) may not impede the natural flow of surface water from the adjacent higher land of another proprietor, as the lower land was subject to a natural servitude to receive surplus water from the higher land. This claim was not considered by either Chamberlain J. or McTiernan J.

For the main principles of law in this respect Windeyer J. relied on the American work of Farnham on the *Law of Water and Water Rights*.[13] The starting point is Farnham's definition of surface water:

> when water appears on the surface in a diffused state, with no permanent source of supply or regular course, and then disappears by percolation or evaporation, its flow is valuable to no one, and must be regarded as surface water, and dealt with as such.[14]

There was no question of riparian rights in relation to surface water, but there were problems with respect to its drainage. It was settled law that one landowner could not, by his own operations, drain surface water over the land of his neighbour, but that a landowner was not responsible for the natural flow of such water. But Farnham recognized that there was a sharp divergence between the American state jurisdictions

> upon the question whether the natural depressions along which the water has been accustomed to flow must be kept open to permit the

[10] *Ibid.* 51. This is also the position in America: *Corpus Juris Secundum.*

[11] (1925) L.R. 52 Ind. App. 385.

[12] (1962) 36 A.L.J.R. 43, 52. This was the principle enunciated in *Pershad Narain Singh v. Koonj Behari Pattuk* (1878) 4 App. Cas. 121, a Privy Council case to which their Lordships in *Maung Bya v. Maung Kyi Nyo* (1925) L.R. 52 Ind. App. 385 referred.

[13] (1904) iii, 2554-2556. References to this work will be to the relevant pages of the report where it was cited, as the work was not available to the writer.

[14] (1962) 36 A.L.J.R. 43, 53.

continued flow of water, or any landowner may ignore and close them at his pleasure.[15]

The Australian authorities also differ on this point, and the main significance of the case lies in the examination by Windeyer J. of the law in this respect.

His Honour firstly remarked that there were some unsettled problems of definition in this area of the law. The phrase 'the natural course of the flow of surface water' could have either of two meanings which, although not important here, could materially affect the outcome of a case:[16] Also, it was not clear whether the claim of the respondent was that the lower owner was under a duty *sic utere tuo ut alienum non laedas* (use your own property as not to injure that of your neighbour), or whether he, as upper owner, had a proprietary right incident to the ownership of the higher land. Moreover, some difficulties had also been caused because the primary rule that a lower landholder cannot complain of surface waters flowing onto his land had been expressed in terms which say that the upper owner has a 'right' to discharge casual water, and that there is a corresponding duty on the lower owner to receive the water. But this right may only be a mere 'liberty', and allow the lower owner to use all lawful means to exclude the water.[17] After drawing attention to these problems of definition Windeyer J. considered whether the respondent's claim had any basis at common law.

It had been assumed by most English, Australian and New Zealand courts that there were two diametrically opposed doctrines which offered solutions to this question. Firstly, there was the civil law rule which recognized a natural servitude of drainage as between adjoining lands, so that the lower owner was obliged to accept the surface water naturally draining onto his land, but, on the other hand, the upper owner could do nothing to increase the flow by artificial means.[18] Secondly, some courts applied a doctrine peculiar to the English common law, known as the 'common enemy' doctrine, whereby each landowner was entitled to take what steps he pleased, on his own land, to dispose of surface water without liability for adverse consequences to his neighbours.[19] Prior to

[15] *Ibid.*

[16] *Ibid.* 54. 'The critical question in this connexion is does the natural course of the flow of surface water from the land of one man to that of another mean the course that it would have taken had both parcels been left wholly undisturbed by man; or . . . does it refer to the state of the whole area of land, whether natural or altered by man, immediately before its severance into separate parcels and separate ownerships?'

[17] Windeyer J. made reference to an article by Professor Derham: 'Interference with Surface Waters by Lower Landholders' (1958) 74 *Law Quarterly Review* 361, and to *Bell v. Pitt* [1956] Tas. S.R. 161, 612 *per* Burbury C.J.

[18] In Roman law however, there were other restrictions on the application of the rule. See Derham *op. cit.* 363. For instance, the rule may only have applied to rural and not to urban lands.

[19] Early American decisions also contrasted these two doctrines, and many state jurisdictions still do, but the interpretation of the doctrines has led to somewhat similar results in practice. In civil law jurisdictions it has been held that an upper owner may take reasonable steps to drain surface water in a more concentrated form, but also that he must not cause unreasonable inconvenience in exercising his rights. The courts have, moreover, in cases where a lower owner has erected barriers to impede the flow, been more willing to consider whether the water was

1915, Australian decisions favoured the common law approach, although there were statements in the Victorian cases of *Vinnicombe v. MacGregor*[20] and *Walker v. Nelson*[21] that the civil law rule applied. In the High Court case of *Nelson v. Walker*[22] however, there are strong *dicta* from Griffith C.J. and O'Connor J. to the opposite effect. However, in 1915 the civil law rule was stated to be part of the English common law by the Privy Council in *Gibbons v. Lenfestey*.[23] The case came on appeal from Guernsey, and in the Channel Islands the principal authority as to customary law is the Grand Coutumier of Normandy, probably compiled late in the reign of Henry III,[24] so that any statement as to the English common law must be regarded as *obiter dicta*. Their Lordships also added however, that an upper owner could, 'in the natural use of his property', concentrate surface water which the lower owner would be obliged to accept. Windeyer J. stressed that the words 'in the natural use of his property' were vital, for it was a principle of the law of nuisance that a landowner could use his land in a way that was reasonably necessary for its use; that is, if it were a natural use.[25] As a result of *Gibbons v. Lenfestey*[26] however, several of the Australian and New Zealand courts were prepared to alter their attitude.[27] But even though applying the civil law rule, several courts were able to make a finding favourable to the lower owner by stressing the distinction between urban and rural lands, or by finding that the flow of water was by artificial means.[28] However, in *Bell v. Pitt*[29] Burbury C.J. declined to accept that the civil law rule applied and expressed a view with which Windeyer J. agreed.

Windeyer J. declined to trace the history of the common law principle but rather enunciated one in accord with modern notions. He held that the lower owner

> may block or divert it [the surface water] by any works on his own land, so far as they are reasonably necessary to protect his land for his

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natural or artificial drainage, the lower owner being permitted to impede the latter. Modification of the 'common enemy' doctrine has led to the emergence of a 'modified common enemy' doctrine. It is said that the lower owner must not do unnecessary harm to the upper owner, or that he must adopt the practical method of protecting his land. Other courts have held that the lower owner's liberty to exclude water is subject to the law of nuisance. Other jurisdictions have expounded a 'reasonable user' rule. It is said simply that each landowner may treat surface water as he pleases, provided his use is reasonable according to all the relevant factors. See 'Modern Status of rules governing interference with Drainage of Surface Waters', an annotation to *Armstrong v. Francis Corporation* (1956) 59 Am. L.R. 2d 421-445.

[20] (1902) 28 V.L.R. 144; (1903) 29 V.L.R. 32. [21] [1909] V.L.R. 476.

[22] (1910) 10 C.L.R. 560. [23] (1915) 84 L.J. P.C. 158; 113 L.T. 55.

[24] See *The British Commonwealth: The Development of its Laws and Constitutions*, i, The United Kingdom, 1141.

[25] (1962) 36 A.L.J.R. 43, 56-57. This point had been made in *Dubois v. District Council of Noarlunga* [1959] S.A.S.R. 127, 130 *per* Napier C.J. In that case the concentration of water by the upper owner was held to be unreasonable.

[26] (1915) 84 L.J. P.C. 158.

[27] For example: *Traian v. Ware* [1957] V.L.R. 200; *Bailey v. Vile* [1930] N.Z.L.R. 443.

[28] *City of Oakleigh v. Brown* [1956] V.L.R. 503; *Coulter v. T. M. Burke Pty Ltd* [1960] V.R. 16; *Righetti v. Wynn* [1950] Q.S.R. 231; *Strange v. Andrews* [1956] N.Z.L.R. 948. [29] [1956] Tas. S.R. 161.

> reasonable use and enjoyment; but that in doing so he must not act recklessly of his neighbour so as to cause wanton damage to him.[30]

His Honour remarked that except in relation to 'spite fences' this finding was in accord with the modern law of nuisance, in which the notion of reasonableness was embedded, and that this shift in emphasis from stating absolute rights to a broader concept of duty illustrates how proprietary rights have been accommodated to modern social interests. His Honour then gave a summary of the law in relation to the flow of surface waters[31] which will prove an invaluable guide for those seeking to know the law in this respect. In addition to the rules of law already noted, Windeyer J. held that an upper owner will not be liable for an unreasonable flow of concentrated water if the concentration were due to work done outside his land by some other person or body, and also that a lower owner may not divert surface water to the land of a third party. Because the evidence did not establish a right to relief to Kidman according to these rules, the declaration and injunction were set aside.

The main significance of the case is the fact that the High Court has settled some uncertain points of law in relation to riparian rights and the flow of surface waters, and as the number of recent cases show, the problems are of importance to the lawyers in the practical field. Some comments might be made however, on the concept of reasonableness.[32] The difficulty in the use of such phrases as 'reasonable use' and 'natural use' is that it will make it difficult for a landholder to anticipate in some cases just how a court may adjudge his actions. Such phrases are more suited to a liability rule, when the damage done was not contemplated. Perhaps the only way to avoid this would be to state definite rules such as the civil law and common enemy doctrines. However, such rules would be out of step with modern notions, and it may be that if landholders were uncertain as to the outcome of a dispute they might be more willing to reach an agreement. Also, because of the complexity of the fact situations that may arise, a reasonable user rule is the most suitable. It provides the courts with a sensible test unencumbered by qualifications and requirements. It may be that in the interests of justice there will necessarily be some uncertainty. The case is also another example of how the notion of reasonableness is being used in circumstances where a statement of absolute rights or duties could lead to harm. The notion was used by the Privy Council in *The Wagon Mound*[33] to limit liability in negligence cases, and it may be that a similar restriction applies to *Rylands v. Fletcher*[34] cases.[35]

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[30] (1962) 36 A.L.J.R. 43, 57.

[31] It was emphasized that surface waters do not include 'flood channels'; that is, the super-abundant waters of a stream or river in time of flood which extend beyond the banks, to which riparian rights attach.

[32] In making these points I have drawn partly on the article by Derham *op. cit.*

[33] *Overseas Tankship (U.K.) Ltd v. Morts Dock & Engineering Co. Ltd* [1961] A.C. 388.

[34] (1868) L.R. 3 H.L. 330.

[35] See *Eastern and South African Telegraph Company Ltd v. Cape Town Tramways Companies Ltd* [1902] A.C. 381; *Perry v. Kendricks Transport Ltd* [1956] 1 W.L.R. 85.